(8)

Supreme Court, U.S.
FILED
MAY 28 2004
OFFICE OF THE CLERK

No. 03-641

In the Supreme Court of the United States

REGAL CINEMAS, INC. AND EASTGATE THEATRE, INC.,
PETITIONERS

v.

KATHY STEWMON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

R. ALEXANDER ACOSTA
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES J. RAGGIO
General Counsel
Architectural and Transportation Barriers Compliance Board
Washington, D.C. 20004

QUESTIONS PRESENTED

Pursuant to Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 *et seq.*, a Department of Justice regulation requires that wheelchair spaces in newly constructed assembly areas "provide people with physical disabilities * * * lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. The questions presented are:

1. Whether, in stadium-style movie theaters with 300 or fewer seats, wheelchair seating that is limited to the very front rows of the theater and that is not part of the stadium-style seating complies with the regulation's requirement that "lines of sight" for individuals with disabilities be "comparable" to those enjoyed by the general public.

2. Whether a court should defer to an administrative agency's interpretation of its own regulation, when the interpretation is adopted without notice and comment under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

3. Whether an administrative agency's interpretation of a regulation may be enforced retroactively, even though the interpretation was adopted without notice and comment under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The central question in this case is whether the Department of Justice has reasonably interpreted its own regulation, which requires that wheelchair users in movie theaters be afforded "lines of sight" that are "comparable" to those enjoyed by the general public, to prohibit movie theaters from relegating all wheelchair users to the worst seats in the very front of the theater and excluding them entirely from the benefits of modern stadium-style theater designs. That issue does not warrant further review both because forthcoming regulatory amendments are expected to address and resolve the interpretive question that petitioners raise and because the Justice Department's application of its regulation fully comports with longstanding administrative principles. Beyond that, petitioners' attempt to obtain, on interlocutory appeal of a liability ruling, this Court's review of purely hypothesized equitable relief that has not been, and may never be, ordered by the lower court

or any other court does not satisfy this Court's established criteria for granting certiorari.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), including in "such critical areas as * * * public accommodations * * * [and] recreation." 42 U.S.C. 12101(a)(3).[1] Title III of the Disabilities Act mandates that:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). The "public accommodation[s]" covered by Title III include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment," and an "auditorium, convention center, lecture hall, or other place of public gathering." 42 U.S.C. 12181(7)(C) and (D). Congress defined the prohibited forms of discrimination to include "a failure to design and construct facilities for first occupancy [after January 26, 1993], that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1).

To implement those new construction requirements, Congress directed the Attorney General to promulgate regula-

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[1] A study submitted to Congress by the National Council on the Handicapped (currently known as the National Council on Disability) revealed that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances. *On the Threshold of Independence* 16 (1988).

tions that are consistent with minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board (Access Board). See 42 U.S.C. 12186(b) and (c), 12204. The Department of Justice accordingly issued final regulations establishing accessibility requirements for new construction that incorporated the Access Board's Americans with Disabilities Act Accessibility Guidelines (Accessibility Guidelines). See 28 C.F.R. 36.406(a), Pt. 36, App. A; 56 Fed. Reg. 35,544, 35,546 (1991). One of the Department's regulations is Standard 4.33.3, which requires that, in movie theaters and other public assembly areas:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

28 C.F.R. Pt. 36, App. A, § 4.33.3 (Standard 4.33.3).

The Access Board is close to completing a multi-year revision of its Accessibility Guidelines. See Access Board, *Revision of ADA and ABA Accessibility Guidelines*, <http://www.access-board.gov/ada-aba/status.htm.> The Board published a notice of proposed rulemaking in 1999, 64 Fed. Reg. 62,248-62,538 (1999), and made public its "draft final guidelines" in April 2002. See 67 Fed. Reg. 15,509 (2002). Those amended guidelines make clear that, in assembly areas of more than 300 seats, wheelchair spaces shall be dispersed and shall provide wheelchair users a choice "of seating locations and viewing angles substantially equivalent to, or better than," those "available to all other spectators." Access Board, *Draft Final ADA and ABA Accessibility Guidelines* § 221.2.3 (April 2002). The draft final guidelines also state that vertical dispersal of wheelchair spaces would not be required in assembly areas of 300 seats or less if the wheelchair seats provided "viewing angles that are equiva-

lent to, or better than, the average viewing angle provided in the facility." *Id.* § 221.2.3.2 (emphasis omitted).

The Access Board unanimously approved its revised guidelines in their final form on January 14, 2004, <http://www.access-board.gov/ada-aba/status.htm>, and submitted them to the Office of Management and Budget for review and clearance pursuant to Executive Order No. 12,866, 58 Fed. Reg. 51,735 (1993). OMB has not yet completed that process. See Office of Info. & Regulatory Affairs Exec. Order Submissions Under Review (May 28, 2004), <http://www.whitehouse.gov/omb/ library/ OMBREGSP.html>.

2. a. The mid-1990s saw a revolution in movie theater design with the advent of "stadium-style" seating. Traditional movie theaters were designed with rows of seats on gently sloping floors. In 1995, the first "stadium-style" movie theater opened in the United States. As the name suggests, the seating plan for such theaters mimics that of a stadium, where the seats are placed on elevated tiers, with each row of seats rising up to 18 inches above the row in front of it. Pet. App. 3a-4a; Pet. 2. Some stadium-style theaters retained a small, traditional-style area with seats on a flat or sloped floor that are close to the movie screen and that are situated in front of and significantly lower than the stadium section. See Pet. App. 4a. The stadium-style theaters proved to be very popular among customers, causing a "boom in stadium-style theater construction" across the country. AMC Br. 3; see Pet. 2.

Some of the new theaters were designed in a manner that included wheelchair-accessible seating in the stadium-seating area. Pet. App. 4a n.3. In other theaters, however, the stadium-style section can be accessed only by stairs, and wheelchair users are restricted to the traditional section immediately in front of the movie screen. See *id.* at 4a, 28a. Seats that close to the movie screen have extreme viewing angles that often cause significant physical discomfort and

high levels of image distortion. See *id.* at 4a-6a, 14a-15a & n.7, 17a. Patrons in those seats may have to tilt their heads back at an uncomfortable angle to see the whole picture and may experience blurry vision, dizziness, and nausea because of the difficulty of focusing their eyes on the film. See *id.* at 5a-6a, 17a. For that reason, the National Association of Theatre Owners previously acknowledged that seats in the very front rows are the "least desirable" and "the last to be taken." See *United States* v. *AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1101 (C.D. Cal. 2002).

b. Respondents are wheelchair users who have attempted to view movies in six of petitioners' stadium-style movie theater complexes. In the vast majority of petitioners' theaters at issue in this case, wheelchair users are required to sit in the non-stadium-style area very close to the screen. In 16 of the theaters, all wheelchair spaces are in the front row. Some of those seats are only 11 feet from the screen. Pet. App. 3a-4a & n.3; C.A. E.R. 40-41, 43-58.

Respondents filed suit under Title III of the Disabilities Act, alleging that the theaters violated the requirement in Standard 4.33.3 that lines of sight be comparable by creating "significant disadvantages for wheelchair-bound patrons." Pet. App. 4a. In particular, while general public seating provided an average vertical viewing angle to the screen of 20 degrees, the viewing angles in the wheelchair locations right in front of the screen ranged from 24 to 60 degrees and averaged 42 degrees. *Ibid.* That "tremendous disparity" in lines of sight was exacerbated by the general inability of customers in wheelchairs to slump or recline their bodies to compensate for the unfavorable viewing angles. *Id.* at 5a; see *id.* at 15a n.7 ("uncontroverted evidence" that the viewing angles are "objectively uncomfortable"). Respondents endured significant physical difficulties and discomfort in trying to watch movies in petitioners' theaters. *Id.* at 5a-6a ("[I]t made me dizzy trying to focus. * * * I only lasted

about 15 minutes."); *id.* at 6a (view made patron "nauseous and gave her a headache").

The district court granted summary judgment to petitioners. Pet. App. 27a-39a. "[T]empting as it [was] to rely on the 'plain meaning' of the regulation" (*id.* at 35a), the district court chose instead (*id.* at 32a-36a) to track the Fifth Circuit's decision in *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783, cert. denied, 531 U.S. 944 (2000), which held that the regulatory requirement that patrons in wheelchairs be offered "comparable" "lines of sight" does not require "anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen," *id.* at 789.

3. The court of appeals reversed and entered summary judgment on liability for the respondents. Pet. App. 1a-26a. The court held that the Department of Justice reasonably construed its "comparable" "lines of sight" requirement in Standard 4.33.3 to encompass a patron's viewing angle to the screen. The court relied on the "plain meaning of the regulation both in general and as understood in the movie theater industry." *Id.* at 15a. The court also concluded that the Department's interpretation was consistent with the purpose of Title III:

> In the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose. We find it simply inconceivable that this arrangement could constitute "full and equal enjoyment" of movie theater services by disabled patrons.

Id. at 17a.

Judge Kleinfeld dissented. Pet. App. 18a-26a. He agreed that the majority "is rightly troubled by the notion of a wheelchair ghetto in one part of the movie theater with sight lines worse than those of the other patrons," but believed that problem could be addressed through the requirement that wheelchair seating be an "integral part" of the seating plan, where the "lines of sight cannot be substantially different from those of seats available for the general public." *Id.* at 21a. Judge Kleinfeld further criticized the majority for failing to provide a detailed "floorplan" for theater owners. *Id.* at 26a.

DISCUSSION

1. A Department of Justice regulation implementing Title III of the Americans with Disabilities Act requires that patrons in all assembly areas be afforded "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. The "core area of disagreement" for which petitioners seek this Court's review (Pet. Reply 3; see *id.* at 4) is whether that regulation requires that individuals with disabilities be afforded a comparable ability to view the screen or whether it merely requires that the view for disabled patrons not be obstructed. The Fifth Circuit has held that the regulation requires only that wheelchair patrons be afforded "unobstructed views of the screen." *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783, 789, cert. denied, 531 U.S. 944 (2000). By contrast, the court of appeals here, Pet. App. 12a-17a, and the Sixth Circuit, in *United States* v. *Cinemark USA, Inc.*, 348 F.3d 569, 576 n.6 (2003), petition for cert. pending, No. 03-1131 (filed Feb. 4, 2004), have held that the regulation also requires comparable viewing angles to the screen for individuals with disabilities. That conflict does not merit this Court's review for three reasons.

First, that "core area of disagreement" over interpretation of the Department's regulation is of no enduring importance because the dispute will be addressed and likely resolved by the Access Board's forthcoming promulgation of its updated Accessibility Guidelines, which will be followed by the Department of Justice's conforming amendments to its own regulations. See Access Board, *Draft Final ADA and ABA Accessibility Guidelines* §§ 221.2.3, 221.2.3.2 (Apr. 2, 2002). Furthermore, given the substantial weight that the Fifth Circuit put on what it perceived to be the Access Board's ambivalence about the coverage of viewing angles, 207 F.3d at 789, issuance of the updated guidance will largely remove the analytical underpinnings of that decision and thus may well effectively eliminate the circuit conflict.

There is no need for this Court to exercise its certiorari jurisdiction to address an issue of regulatory interpretation that is presently being addressed directly by the relevant regulatory bodies themselves. Further, the issuance of the Access Board's guidance, to be followed by the Department of Justice's amendment of the regulation at the center of the present litigation (Standard 4.33.3), will fundamentally change the terms of the debate on the question presented. The implications of those amendments should be addressed by the lower courts in the first instance.[2]

Second, the conflict is relatively shallow. Only the *Lara* court has rejected the Justice Department's interpretation of

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[2] Amicus National Association of Theatre Owners (NATO) emphasizes (Br. 2-3 & App. A) that, in the midst of its members' litigation over this issue, it requested that the Justice Department undertake rulemaking to clarify the coverage of viewing angles. That regulatory process is now underway. As explained in the Justice Department's response, moreover, the Department's obligation to ensure that its regulations comport with the Access Board's "minimum guidelines," 42 U.S.C. 12186(b) and (c), 12204, has caused the Department to postpone issuing its own amendments until the Access Board completes its revisions. See NATO Br. App. B.

its own regulation. The Sixth Circuit recently joined the court of appeals in this case in sustaining the Department's interpretation. The issue is being actively litigated within the First and Second Circuits. See *United States* v. *Hoyts Cinemas Corp.*, Nos. 03-1646, 03-1787 & 03-1808 (1st Cir. argued Feb. 6, 2004); *Meineker* v. *Hoyts Cinemas Corp.*, 69 Fed. Appx. 19 (2d Cir. 2003) (remanding case).[3] If those circuits join the rulings of the Sixth and Ninth Circuits, and if the Fifth Circuit is ever presented with another case raising the same issue, then that court might reconsider its position—a prospect that is heightened by the forthcoming regulatory amendment.

Nor is this an area in which uniformity is especially vital. Building codes, design requirements, and zoning restrictions vary in manifold ways not just from circuit to circuit, or even from state to state, but often from county to county and town to town. In addition, every State has its own law providing (at varying levels) protection for the rights of individuals with disabilities. See *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001). Theater owners and their construction companies and architects thus already confront and deal with variations in the laws and regulations governing theater design on a daily basis.[4] Petitioners have identified no reason why they cannot similarly accommodate this shallow conflict on the scope of Standard 4.33.3 for the time remaining until the clarifying amendments issue. To the extent that petitioners seek a uniform

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[3] Petitioner's parent company now owns Hoyts Cinemas, *Meineker*, 69 Fed. Appx. at 21 n.1, and paid for the preparation of both the petition and Hoyts' amicus brief in this case, Hoyts Br. 1 n.1.

[4] Petitioners' own amicus makes this point quite forcefully. NATO Br. 11 ("The design and construction of a modern motion picture theatre * * * requir[es] the accommodation of a myriad of economic, aesthetic and legal constraints. Architects and other design professionals are required to consider and ensure compliance with all federal, state and local building codes, safety regulations and accessibility requirements.").

model for new construction, nothing in the Fifth Circuit's decision prevents them from complying with the requirements of the Disabilities Act as enforced by the Sixth and Ninth Circuits.

Third, and relatedly, the court of appeals' decision in the present case is correct—and the *Lara* court's analysis is such a stark departure from well-established principles of regulatory interpretation that the circuit split is unlikely to widen. The Justice Department's interpretation of "comparable" "lines of sight" as encompassing patrons' viewing angles must be sustained unless it is "plainly erroneous or inconsistent with the regulation." See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Department's interpretation comports with the ordinary understanding of "lines of sight." See *Webster's Ninth New Collegiate Dictionary* 695 (1991) ("line[] of sight" is "a line from an observer's eye to a distant point toward which he is looking"). It also tracks long-established understandings of the phrase within the theater industry.[5] Indeed, petitioners'

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[5] See Society of Motion Picture & Television Engineers (SMPTE), *EG 18-1989, Engineering Guideline: Design of Effective Cine Theaters*, at 3 (Dec. 19, 1989), *reprinted* 99 Soc'y Motion Picture & Television Engr's J. 494 (June 1990) ("Since the normal line of sight is 12° to 15° below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35°, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15°."); *id.* at 495 ("The nearest viewer's vertical line of sight should not exceed 35° from the horizontal to the top of the projected image."); SMPTE, *EG 18-1994, Engineering Guideline: Design of Effetive Cine Theaters* (Mar. 25, 1994) (same); American Institute of Architects, *Ramsey/Sleeper Architectural Graphic Standards* 17 (student ed. 1989) (discussing the "sightline from the first row to the top of the screen" in terms of maximum recommended angle); George C. Izenour, *Theater Design* 4 (1977) ("A good sight line is one in which there are no impediments to vision and angular displacement (vertical and horizontal) of the eyes and head falls within the criteria for

own amicus, the National Association of Theatre Owners (NATO), took the position immediately prior to the first construction of stadium-style theaters in this country, that "lines of sight are measured in degrees," not just in terms of whether a view is obstructed. See NATO, *Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums* 6 (Jan. 27, 1994); see *United States* v. *AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1101-1102 (C.D. Cal. 2002) (discussing repeated statements of NATO, prior to a change in position by 2000, acknowledging that "lines of sight are most commonly measured in degrees"). Hoyts Cinemas, which is owned by the same parent company as petitioner, see note 3, *supra*, was aware in 1991 that sight lines included viewing angles. *Meineker*, 69 Fed. Appx. at 25 nn.7 & 9. The Justice Department's interpretation thus rests upon plain meaning, backed by an established industry understanding that the phrase "lines of sight" encompasses far more than a binary inquiry into whether the viewer's vision is obstructed.

Petitioners' (Pet. 8, 17) and the dissenting judge's (Pet. App. 20a) suggestion that the Access Board interpreted "lines of sight" to exclude viewing angles is flatly incorrect. In 1998, the Access Board published a technical assistance manual that explained, in a section titled "Sight Lines," that

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comfort."); *id.* at 3 (diagram showing "Normal Sight Line" as 15 degrees below horizontal); *id.* at 284 ("distance and angular displacement" are among the types of "sight line problems" found in auditoriums); *id.* at 71, 598-599 (excerpting a treatise from the 1830s, John Scott Russell, *Treatise on Sight Lines and Seating* (1830), which provided that the "best" seats in an auditorium "are not so far forward as, by being immediately under the speaker, to require [one] to look up at a painful angle of elevation"); Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* 69 (2d ed. 1964) ("Maximum tolerable upward sight line angle for motion pictures" was 30 degrees from the horizontal to the top of the movie screen.); *ibid.* (viewing experience will be adversely affected by "upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action").

"[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas." Access Board, *Americans with Disabilities Act Accessibility Guidelines Manual* 117 (1998). Likewise, in November 1999, the Board explained that,

> [a]s stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at uncomfortable angles and to constantly move their heads from side to side to view the screen. They are afforded inferior lines of sight to the screen.

64 Fed. Reg. 62,248, 62,278 (1999). The Access Board's simultaneous statement in 1999 that it was considering whether to include "specific requirements," *ibid.*, on viewing angles in its final rules was simply an acknowledgment that the Accessibility Guidelines did not yet "include specific technical provisions to assist design professionals." *Id.* at 62,277. But the fact that the Access Board's own technical publication lacked design specifications does not mean that the Justice Department's regulation lacked the substantive coverage of viewing angles.

That ordinary understanding of the phrase "lines of sight" also serves the central purpose of Title III of the Disabilities Act, which is to preclude the "outright intentional exclusion" of individuals with disabilities and to ensure their "full and equal enjoyment of the goods, services, facilities, privileges, [and] advantages" offered by public accommodations. 42 U.S.C. 12101(a)(5), 12182(a). As petitioners themselves describe it (Pet. 2, 6), the advent of stadium-style seating in movie theaters marked a sea change in the viewing ex-

perience for theater patrons. The Department's interpretation of its regulation ensures that theater designs do not leave customers in wheelchairs on the sidelines and do not *completely exclude* them from experiencing and enjoying the benefits of that new innovation in movie-watching vantage points. Indeed, petitioners' position would have the perverse effect of causing the advent of stadium-style seating to enhance the viewing experience of patrons without disabilities while simultaneously immiserating patrons with disabilities.[6]

Moreover, petitioners' and the *Lara* court's reading of the regulation as prohibiting only obstructed views lacks any anchor in the regulatory text. The word "unobstructed" appears nowhere in Standard 4.33.3—a conspicuous omission if that were the regulation's sole *raison d'être*. Their cramped reading of the regulation also overlooks that Standard 4.33.3 applies not just to movie theaters, but to the entire swath of public assembly areas, including stadiums, live theaters, opera houses, and concert and lecture halls. It would confound congressional purpose to reduce the broad promise of "full and equal enjoyment" of "comparable" "lines of sight" in all those different venues to nothing more than a requirement that wheelchair users not be seated behind poles.

2. Petitioners also seek this Court's review (Pet. 18-26) of the court of appeals' holding that the Department's interpretation of its own regulation should be accorded deference. That claim does not merit further review. This Court has repeatedly held that an agency's interpretation of its own

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[6] Given the enormous "popularity with the theater-going public" of stadium-style seating (Pet. 2)—a consumer demand that prompted a nationwide reconfiguration of theaters (Pet. 2, 6)—petitioners' litigation position that the few remaining non-stadium style seats located in the very front rows of the theater are of "equal desirability" (Pet. 9 n.8) defies commonsense and common experience. See 64 Fed. Reg. at 62,278 (Access Board notes the "superior[ity]" and "popular[ity]" of stadium-style seating).

regulation is entitled to substantial deference. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 387-388 (2003) ("[T]he Commissioner's interpretation of her own regulations is eminently sensible and should have been given deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).").[7] Certiorari review is not warranted to say again what the Court said unanimously just last year.

Petitioners contend (Pet. 19-20; Pet. Reply 7-8) that the court of appeals' decision conflicts with *Christensen* v. *Harris County*, 529 U.S. 576 (2000). It does not. *Christensen* concerned the level of deference due to agency interpretations of *statutes*, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Christensen*, 529 U.S. at 587. With respect to the separate question of deference to an agency's interpretation of its own regulation, *Christensen* simply applied *Auer* and concluded that the particular agency interpretation before the Court did not merit deference because it was inconsistent with the regulation's text. *Id.* at 588. The Court has expressly reaffirmed the rule of deference to agency interpretations since *Christensen*. See *Keffeler*, *supra*; *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002).

Petitioners further argue (Pet. 20-23) that the courts of appeals have issued conflicting decisions on the deference due to agency interpretations of their own regulations. But petitioner has identified no conflict in the legal standard employed by the courts, nor is the government aware of any.

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[7] See also *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); *Auer*, 519 U.S. at 461 (agency interpretation will be sustained unless it is "plainly erroneous or inconsistent with the regulation") (citation omitted); *Thomas Jefferson Univ.*, 512 U.S. at 512 (same); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Bowles*, 325 U.S. at 414 (same).

The decisions petitioners cite are either irrelevant or simply reflect the fact that application of the same legal standard to different facts in different cases can yield different outcomes. That is to be expected. Rather than evidencing a need for this Court's intervention, those cases demonstrate that the deference standard already adopted by the Court is working.[8]

Petitioners also suggest (Pet. 22) a circuit conflict on the appropriateness of the Department's articulation of its views in an amicus brief. But, again, petitioners identify no conflict in the circuits on the legal standard to be applied in determining whether deference is appropriate. Both *National Wildlife Federation* v. *Browner*, 127 F.3d 1126 (D.C. Cir. 1997), and *Akzo Nobel Salt, Inc.* v. *Federal Mine Safety & Health Review Commission*, 212 F.3d 1301 (D.C. Cir. 2000), involved straightforward applications of *Auer*. The difference in outcomes turned not upon the law applied, but on whether, on the facts of the particular case, the interpretation reflected the "fair and considered judgment" of the agency. *National Wildlife*, 127 F.3d at 1129; *Akzo*, 212 F.3d at 1304. That inquiry is not in doubt here, because the Department's interpretation has also been manifested in

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[8] See *Meineker*, 69 Fed. Appx. at 23 (applying *Auer* and *Thomas Jefferson*); *Sketoe* v. *Exxon Co., USA*, 188 F.3d 596, 597 (5th Cir. 1999) (agency interpretation of a *statute*), cert. denied, 529 U.S. 1057 (2000); *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) (same), cert. denied, 528 U.S. 1106 (2000). While the District of Columbia and Third Circuits reached different conclusions about deference to the Justice Department's interpretation of its regulation in another context (views over standing spectators), both courts applied the same legal standard. See *Caruso* v. *Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 736-737 (3d Cir. 1999) (applying *Thomas Jefferson*); *Paralyzed Veterans* v. *D.C. Arena L.P.*, 117 F.3d 579, 584-585 (D.C. Cir. 1997) (applying *Auer* and *Thomas Jefferson*), cert. denied, 523 U.S. 1003 (1998). The Third Circuit just found that an "alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso*, 193 F.3d at 736 (quoting *Thomas Jefferson*, 512 U.S. at 512).

numerous enforcement actions. See *United States* v. *Cinemark USA, Inc.*, *supra*; *United States* v. *Hoyts Cinemas*, *supra*; *AMC Entm't*, *supra*; *Lonberg & United States* v. *Sanborn Theaters, Inc.*, No. 97-6598 (C.D. Cal.).[9]

In any event, this case is not an appropriate vehicle for addressing the level of deference due to an agency interpretation of its own regulations. First, in holding that "comparable" "lines of sight" encompasses the viewing angles to the screen, the court of appeals here (Pet. App. 15a) and the Sixth Circuit (03-1311 Pet. App. at 9a) both relied on the "plain meaning" of the regulatory text, which makes this case a particularly inapt vehicle for fixing the precise level of deference owed to an agency's interpretation of its own regulation. Cf. *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 & n.8 (2002) (declining to address the precise level of deference owed to an agency interpretation of a statute that reflected the best view of the statute's plain meaning).[10]

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[9] The other cases petitioners cite miss the mark. Dicta in *Keys* v. *Barnhart*, 347 F.3d 990 (7th Cir. 2003) are of no help because the government's brief "did not offer an interpretation of the agency's regulations," *id.* at 994. *Brandt* v. *Village of Chebanse*, 82 F.3d 172 (7th Cir. 1996), and *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000), do not involve deference at all, but instead address whether a particular agency position reflects a legislative rather than an interpretive rule. Because, as the court of appeals here found (Pet. App. 15a), the "plain meaning" of the regulation "both in general and as understood in the movie theater industry" encompasses the viewers' relative ability to view the movie on the screen, the Department's interpretation falls squarely within the four corners of the regulatory text. Petitioners, for their part, make no effort to explain how the Department's position is any less interpretive (or more legislative) than their reading of the regulation as prohibiting only particular types of physical barriers to view. The forthcoming regulatory amendments render that debate of no enduring importance anyhow.

[10] Petitioners' contention (Pet. Reply 6) that there is a conflict on the agency deference rule between the Fifth Circuit in *Lara* and the court of appeals here is wrong. The Fifth Circuit never discussed the issue, see 207 F.3d at 787-789, as the district court in this case recognized, Pet. App. 32a-33a.

Second, petitioners do not contend that their proposed interpretation—that only obstructed views are prohibited—flows ineluctably from the statutory text. In reality, it is the petitioners' non-textual position that is the product of "after-the-fact" interpretation issued without "APA notice and comment" (Pet. 18). Furthermore, petitioners' reading of the regulation as prohibiting obstructed views necessarily agrees, at some level, with the Department's quite natural reading of "comparable" "lines of sight" as referring to the ability of a wheelchair user to view a performance. Petitioners do not dispute that the regulation prohibits a theater design where wheelchair users cannot view the movie because there are heads, headrests, or poles right in front of them. Petitioners simply disagree that the regulation also prohibits designs where wheelchair patrons cannot view the movie because the screen is right in front of them. That difference does not bespeak a fundamental divergence in the legal rules governing agencies' authority to interpret their own regulations; it is simply the byproduct of a case-specific disagreement about which forms of physical barriers to viewing a movie are covered by the regulation. That type of programmatic linedrawing does not present any broad legal question for this Court's review.

Petitioners' real complaint (Pet. 17-18) appears to be less with the Department's interpretation of its own regulation than with the Department's failure to provide prospective design specifications. But that objection does not bolster the basis for this Court's review. The meaning of "lines of sight" in the regulation never changed. The plain text of the regulation, industry practice, and petitioners' own reading of the regulation as prohibiting obstructions all indicate that, from the outset, "lines of sight" has encompassed patrons' ability to view the movie on the screen. What changed in the mid-1990s was not the regulatory interpretation, but the movie theaters' design. It was not until 1995 that movie theaters

first offered stadium-style seating and, as part of that development, began marketing to consumers the enhanced lines of sight that are the defining feature of stadium-style seating. With respect to most of the theaters at issue here, petitioners closed that new market to patrons with disabilities by completely excluding them from the sight-line benefits of the stadium-style design. It was against that backdrop that the Justice Department went on record, in its 1998 amicus brief in the *Lara* case, to make clear how the "comparable" "lines of sight" requirement in Standard 4.33.3 applies in the specific context of stadium-style movie theaters. But that does not mean that the underlying meaning of the regulation changed; it means only that a new opportunity for its application arose.

After all, while stadium-style seating was new to movie theaters, it was not new to stadiums and other assembly areas.[11] That application of extant regulatory standards and agency expertise to a specific factual scenario is what regulators routinely do; it is not an event that triggers the duty to engage in notice-and-comment rulemaking. And it is not the type of broad or enduring legal question that merits an exercise of this Court's certiorari jurisdiction, especially given that ten years have elapsed since stadium-style movie theatres first appeared and six years have now passed since the *Lara* brief was filed.[12]

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[11] See, *e.g.*, Letter from Merrily Friedlander, Acting Chief of the Coordination and Review Section, Civil Rights Div., Dep't of Justice, to Daniel L. Hesse, Director/Eng'r, Yakima County Public Works Dep't regarding Yakima County Stadium 3 (Nov. 21, 1994) ("'Line of sight' in an assembly area refers to both the ability to see performance areas and the angle from which performance areas are seen."), cited in *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 709 n.9 (D. Or. 1997).

[12] Petitioners wrongly assert (Pet. 7-8 & n.7) that the Department of Justice has repeatedly changed its interpretation of the comparable lines of sight requirement. Petitioners offer *no* evidence that the Department ever said that viewing angles are not an aspect of "lines of sight." And four courts have specifically found that the Department's interpretation

3. Lastly, petitioners' argument (Pet. 3, 26-29) that they lacked "fair notice" of the regulation's operation and that reading it to require retrofitting of petitioners' movie theaters (Pet. Reply 9) would violate due process does not merit this Court's review. The only thing the court of appeals decided was that petitioners' total exclusion of wheelchair patrons from stadium-style seating and relegation of wheelchairs to locations with the worst sight lines in the house violate the regulatory requirement that "lines of sight" be "comparable." As petitioners concede (Pet. 10), the issue of fair notice and the appropriate equitable remedy for that violation has not yet been decided in this case, or by any other appellate court in the country. Those issues will be addressed on remand. This Court rarely grants review of such interlocutory challenges.[13] Further, because "this is a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 399 (1996)), it would be inappropriate to litigate in this Court, for the first time, the fact-intensive and record-bound question of fair

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has been consistent. Pet. App. 10a-11a & n.5; *Cinemark*, 348 F.3d at 579; *United States* v. *Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 90 (D. Mass. 2003); *AMC Entm't*, 232 F. Supp. 2d at 1112-1113. Petitioners' further complaint (Pet. 17) that the Justice Department has not provided a single set of uniform "construction requirements" overlooks that the comparability of lines of sight is required only on a theater-by-theater basis. The view for wheelchair users need only be comparable to the view of other patrons in the same theater; it need not be as good a view as is offered in a different theater down the street. Furthermore, petitioners' central attack on the Department's interpretation has always been that it overreaches, not that it is insufficiently restrictive and regimented. In any event, that concern is expected to be resolved by the forthcoming regulatory amendments.

[13] See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J.) (denial of certiorari on interlocutory appeal), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review after final judgment).

notice, see *Meineker*, 69 Fed. Appx. at 25, or to attempt to outline in the abstract any possible limitations on purely hypothesized equitable relief.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

R. ALEXANDER ACOSTA
Assistant Attorney General

PAUL D. CLEMENT
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys

JAMES J. RAGGIO
General Counsel
Architectural and Transportation Barriers Compliance Board

MAY 2004

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[14] The dire remedial consequences that petitioners portend need never occur. See *Cinemark*, 348 F.3d at 582 n.10 (government's representation at oral argument that "the United States is not—has not and is not going to argue, for example, that the entire interior of the theater be gutted or torn down. We are going to work with the defendants to come up with a reasonable approach."); *Paralyzed Veterans*, 117 F.3d at 589 ("[T]here [is] a good deal of wiggle room in the degree of compliance contemplated by the regulation and manual, and * * * a judge sitting in equity[] ha[s] ample discretion to fashion the remedial order.").